No.

In the Supreme Court of the United States

OCTOBER TERM, 1979

RICHARD M. NIXON, ET AL., PETITIONERS

v.

HEDRICK SMITH, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

KENT L. JONES
Assistant to the Solicitor General

WADE S. LIVINGSTON
Attorney
Department of Justice
Washington, D.C. 20530

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The Solicitor General, on behalf of Richard M. Nixon, Henry Kissinger, John N. Mitchell, H. R. Haldeman, and the other federal defendants,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

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[1] The other federal defendants include six FBI officers who supervised and conducted the challenged electronic surveillance. The current Attorney General and FBI Director are named as defendants in their capacity as custodians of the surveillance records that respondents seek to have turned over to them (App. A, *infra*, 2a n.1).

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-17a) is not yet reported. The opinion of the district court (App. B, *infra*, 18a-24a) is reported at 449 F. Supp. 324.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 25a-26a) was entered on July 12, 1979. On October 2, 1979, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the President and his closest advisors, including the Attorney General, are absolutely immune from personal damages liability for decisions made in the exercise of the President's official authority.

2. Whether these federal officers are entitled to a qualified immunity as a matter of law for authorizing a warrantless electronic surveillance for national security purposes prior to this Court's decision in *United States* v. *United States District Court*, 407 U.S. 297 (1972).

3. Whether this Court's decision in *United States* v. *United States District Court*, and lower court rulings amplifying that decision, should be applied retroactively to create a personal damages liability for federal officers.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. At the time of the events leading to this litigation, 18 U.S.C. 2511(3)[2] provided, in pertinent part:

> Nothing contained in this chapter * * * shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutioanl power of the President to take such measures as he deems necessary to

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[2] 18 U.S.C. 2511(3) was repealed by Section 201(c) of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1797. This statute, which establishes procedures for the conduct of electronic surveillance for national security purposes, was enacted nine years after the events that gave rise to this litigation.

protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

STATEMENT

1. Between February and April of 1969, President Richard M. Nixon, Assistant to the President H. R. Haldeman, and other high administration officials became concerned that leaks to the press of certain foreign policy documents and classified information were eroding "the candor of foreign governments in dealings with this country" (*Kissinger* Pet. App. 4a).[3] The information that was being improperly divulged revealed the foreign policy position of the United States on several important and sensitive issues, including strategic arms limitations talks then underway with the Soviet Union, peace proposals for the

[3] The facts underlying the surveillance program involved in this case are the same as those in *Kissinger* v. *Halperin*, in which we have filed a petition for a writ of certiorari on this same date. See App. A, *infra*, 3a. Respondents requested the courts below to take judicial notice of the reports of congressional hearings concerning the challenged surveillance program (see note 5, *infra*) and the materials submitted to the district court in *Kissinger* (App. A, *infra*, 6a & n.13).

Middle East, the termination of our then-substantial military involvement in Viet Nam, and the return of the island of Okinawa to Japanese control (Jt. App. 106-111, 120-121; see *Kissinger* Pet. 3).[4] The President and his advisors believed that the untimely release of this classified information might seriously jeopardize the government's foreign policy initiatives in these areas (Jt. App. 120). They also believed that the source of these leaks was likely to be personnel at the National Security Council ("NSC") because the leaked information included certain statements made during confidential discussions within that agency (*id.* at 129-132).

Accordingly, on April 25, 1969, President Nixon met with Attorney General John N. Mitchell, NSC Director Henry Kissinger and FBI Director J. Edgar Hoover to discuss methods for controlling security breaches at the NSC. Hoover advised President Nixon that electronic surveillance, including wiretaps, was an effective method of determining the source of leaks and had been used by previous administrations for similar reasons (Jt. App. 126). Attorney General Mitchell gave his opinion that the use of wiretaps to discover the source of the leaks would be legal (*ibid.*). The President thereupon authorized a program of electronic surveillance and adopted three criteria to identify individuals who would be investigated: (a) access to classified material that

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[4] "Jt. App." refers to the Joint Appendix filed in the court of appeals in the *Kissinger* case. See note 2, *supra*.

had been leaked; (b) unfavorable information in the individual's security file; and (c) FBI investigations that listed the individual as a potential source of leaked information (Jt. App. 137; see App. A, *infra*, 8a; *Kissinger* Pet. App. 61a). At President Nixon's request, Kissinger prepared a list of officials who had access to leaked information (Jt. App. 112).

On June 3, 1969, a story written by respondent Hedrick Smith appeared in the *New York Times* detailing the government's contemplated approach to negotiations with Japan over the return of Okinawa to Japanese control (App. A, *infra*, 3a). The story included statements indicating that the reporter had access to classified NSC information. The consequence of the disclosure of this information was to compromise the negotiations and prejudice the relations of the United States with Japan (Jt. App. 111). On the day after the story appeared in the press, Kissinger met with Hoover and discussed the need for surveillance of Smith to determine the source of the NSC leaks (*id.* at 57; *Hearings* at 215).[5] Hoover thereafter requested and received authority from Attorney General Mitchell to install a wiretap on Smith's telephone, and the wiretap was installed on that day (App. A, *infra*, 3a-4a; *Hearings* at 25). The electronic surveillance was maintained for 89 days. It was removed on August 31, 1969, when Smith

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[5] "*Hearings*" refers to *Dr. Kissinger's Role in the Wiretapping of Certain Government Officials and Newsmen: Hearings Before the Senate Comm. on Foreign Relations*, 93d Cong., 2d Sess. (1974).

moved out of the Washington, D.C., area (App. A, *infra*, 4a).

2. After learning in 1973 of the existence of the electronic surveillance, Smith and his wife and children (the respondents) filed this action in the United States District Court for the District of Columbia, alleging that petitioners' conduct in authorizing and maintaining the wiretap was unlawful under the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*[6] Respondents sought money damages and declaratory and injunctive relief (App. B, *infra*, 18a).

The district court granted petitioners' motion to dismiss, treating it as a motion for summary judgment (App. A, *infra*, 5a-6a). With regard to Title III, the court stated that the meaning of the statute as applied to electronic surveillance for national security purposes was unsettled prior to *United States* v. *United States District Court*, 407 U.S. 297 (1972), and that, especially in light of "the 30-year history of similar Executive actions" (App. B, *infra*, 21a), petitioners " 'should not be held to have acted at their peril in [that] vacuum' " (*ibid.*, quoting *Halperin* v. *Kissinger*, 424 F. Supp. 838, 842 (D. D.C. 1976), rev'd, No. 77-2014 (D.C. Cir. July 12, 1979), petition for cert. filed Dec. 7, 1979).

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[6] Respondents also named the Chesapeake and Potomac Telephone Company as a defendant. The district court dismissed the claim against the telephone company (App. B, *infra*, 23a, 24a) and respondents did not challenge that ruling on appeal.

The district court also concluded that the challenged surveillance did not violate the Fourth Amendment, holding that neither the absence of a warrant nor the fact that the surveillance lasted 89 days made the search constitutionally unreasonable. In the court's view, the fact that the Justice Department required "renewal and review of national security electronic interceptions every ninety (90) days" (App. B, *infra*, 22a), coupled with the fact that the surveillance was terminated after 89 days, satisfied the requirement that the search be conducted pursuant to "particular, precise and discriminate" procedures (*ibid.*).[7]

3. The court of appeals reversed and remanded. Relying on its decision in *Halperin* v. *Kissinger*, *supra*, the court concluded that respondents may be able to establish a claim under Title III if, on remand, they can show that the primary purpose of the surveillance was other than to protect national security information from disclosure to foreign intelligence activities (App. A, *infra*, 7a-9a).[8] The court of appeals also determined that further proceedings were required on respondents' constitutional claim, ruling

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[7] The district court also concluded that respondents' claims were barred by the applicable statute of limitations, 12 D.C. Code 301(8) (1973 & Supp. IV 1977) (App. B, *infra*, 23a-24a). The court of appeals reversed on the statute of limitations issue (App. A, *infra*, 12a-16a), and we do not seek review of that issue in this petition.

[8] We do not seek review of this portion of the court of appeals judgment for the reasons stated in note 8 of our petition for a writ of certiorari in *Kissinger* v. *Halperin*.

that the surveillance challenged in this case may be unreasonable despite its brief duration because "Smith was a working journalist" (*id.* at 11a) and because respondents asserted that " 'political' reasons * * * led to the surveillance" (*id.* at 10a).

The court of appeals also concluded that *United States* v. *United States District Court*, *supra*, and lower court rulings amplifying that decision, apply retroactively to establish liability for national security surveillances conducted in violation of the Fourth Amendment prior to the date of those decisions (*id.* at 9a n.24). Moreover, the court held that the President is not absolutely immune from damages liability in suits brought under the Fourth Amendment, stating that "[t]his question, like the immunity for the other federal officials sued by [respondents], is controlled by our *Halperin* opinion * * *" (*id.* at 16a). Finally, the court stated that respondents' allegation that the surveillance was authorized in bad faith is not "contravened in this record" and that summary judgment on the issue of qualified immunity was therefore inappropriate (*id.* at 9a).

REASONS FOR GRANTING THE PETITION

This case presents important and unsettled questions concerning the immunity of the President and other high-level Executive Branch officials from damages liability and the retroactivity of this Court's decision in *United States* v. *United States District Court*, 407 U.S. 297 (1972). The identical questions are presented in our petition for a writ of certiorari

in *Kissinger* v. *Halperin*, along with a complete statement of the reasons why these questions warrant this Court's review.[9] Indeed, the court of appeals' analysis of these issues relied almost exclusively on its decision in *Halperin*. We therefore believe that the disposition of this petition should be deferred pending disposition of the petition in *Kissinger*.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of *Kissinger* v. *Halperin*.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

KENT L. JONES
Assistant to the Solicitor General

WADE S. LIVINGSTON
Attorney

DECEMBER 1979

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[9] We are providing counsel for respondents with a copy of our petition in *Kissinger*.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1526

HEDRICK SMITH and ANN B. SMITH, Suing Individually and on Behalf of Their Minor Children, LAUREL ANN SMITH, JENNIFER LAURENCE SMITH, and STERLING SCOTT SMITH, APPELLANTS

v.

RICHARD M. NIXON ET AL.

Appeal from the United States District Court for the District of Columbia

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Argued February 9, 1979

Decided July 12, 1979

Before WRIGHT, *Chief Judge*, ROBINSON, *Circuit Judge* and GESELL,* *District Judge*.

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

Opinion for the court filed by *Chief Judge* WRIGHT.

WRIGHT, *Chief Judge*: Appellants seek civil damages from 11 federal officials and the Chesapeake & Potomac Telephone Company (C&P) for violating their constitutional and statutory rights by wiretapping their home telephone for 89 days in 1969.[1] Hedrick Smith, a reporter for the *New York Times*, and his family charge that the electronic surveillance deprived them of their First Amendment rights, constituted an unreasonable search and seizure under the Fourth Amendment, and did not comply with the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[2] The District Court, granting defendants' motions to dismiss, ruled that the wiretap satisfied the requirements of Title III and the Fourth Amendment, and, moreover, that the Smiths' suit was barred by the District of Columbia statute of limitations. We reverse.

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[1] The defendants, appellees here, were former President Richard Nixon, former National Security Adviser Henry Kissinger, former Attorney General John Mitchell, former presidential aides H. R. Haldeman and John Ehrlichman, FBI officials Cartha DeLoach and William Sullivan, and four unnamed FBI agents. Attorney General Griffin Bell and FBI Director William Webster were also sued as custodians of the records of the surveillance, and plaintiffs requested injunctive relief against them as to future surveillance and an order that records of the Smith wiretap be turned over to the plaintiffs.

[2] Pub. L. No. 90-351, 82 STAT. 212 (1968) (codified at 18 U.S.C. §§ 2510-2520 (1976)).

I

The Smith wiretap was part of the same surveillance program involved in *Halperin* v. *Kissinger*, which we also decide today.[3] Authorized by President Richard Nixon and implemented by Attorney General John Mitchell and FBI Director J. Edgar Hoover, the program was designed to identify employees who were disclosing confidential Government information to the press in the first half of 1969.[4] Administration officials were concerned that continued disclosures might jeopardize national security. Surveillance targets were to be chosen according to three criteria: (1) those who had access to information that had "leaked"; (2) those with unfavorable entries in their security files; and (3) those otherwise suspected by the FBI of involvement in leaking.[5]

On June 3, 1969 a story by Smith appeared in the *New York Times* detailing the contemplated American approach to negotiations with Japan over the return of Okinawa to Japanese control.[6] Because no formal discovery has yet taken place, we cannot be certain of events between the appearance of the story and installation of the wiretap. Plaintiffs direct our attention to a June 4 memorandum from FBI Direc-

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[3] *Halperin* v. *Kissinger*, —— F.2d —— (D.C. Cir. No. 77-2014, decided July 12, 1979).

[4] *Id.*, —— F.2d at ——, slip op. at 4-5.

[5] *Id.*

[6] *U.S. Said to Plan an Okinawa Deal Barring A-Bombs*, N.Y. Times, June 3, 1969, at 1, col. 6.

tor Hoover to the Attorney General apparently seeking authorization to wiretap the Smiths' home telephone:

> On this date Dr. Kissinger has requested that a telephone surveillance be placed on [ ], who is also known as [ ]. He is a correspondent with [ ] and has been in contact with the individuals on whom telephone surveillances have been placed. He resides at [ ] and has telephone number [ ]. The files of this Bureau contain no pertinent information of an internal security nature concerning him.[7]

The Smith wiretap was in place from June 4 to August 31, when the Smiths moved out of the Washington area. Although no records of the surveillance have yet been made public, it appears that the procedures followed were roughly the same as those used in the Halperin wiretap.[8] The only formal records kept of the Halperin surveillance were summary letters by the FBI agents conducting the surveillance, which were then submitted to President Nixon,

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[7] *Statement of Information on Impeachment Hearings Before the House Committee on the Judiciary*, Book VII, Part 1, 93d Cong., 2d Sess. 241 (1974) (hereinafter cited as *Statement of Information*). Although the congressional report omitted specific references in order to protect the privacy of wiretap targets, Smith stated in an affidavit to the District Court in October 1976 that he had been identified as the subject of this memorandum. Joint Appendix (JA) 28a-29a.

[8] Memorandum from W. C. Sullivan to W. D. Ruckleshaus (May 11, 1973), in *Statement of Information*, *supra* note 7, at 186.

through presidential counsel John Ehrlichman, and to Kissinger.[9]

The first definite public identification of Smith as a surveillance target came on May 11, 1973, although Smith contends that, because he was then on assignment in Russia for his newspaper, he was not fully aware of the wiretapping program until some time thereafter.[10] This suit was filed on May 10, 1976, with an amended complaint submitted ten months later.[11] On May 8, 1978, following oral argument on defendants' motions to dismiss, the District Court granted those motions.

II

Appellees insist that even though the District Court purported to dismiss this suit under Rule 12 of the Federal Rules of Civil Procedure, the decision should be affirmed as a grant of summary judgment under

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[9] *See* JA 81a-82a (Amended Complaint); *Halperin* v. *Kissinger supra* note 3, —— F.2d at ——, slip op. at 11.

[10] Smith stated in his October 1976 affidavit that from May 10 to June 24, 1973 he was on an extensive reporting assignment in Eastern Europe and that by the time he returned to Moscow the relevant newspaper clippings in his office had been thrown out. He also asserted that confusion in public reports on the period of the wiretapping led him to believe that he could not have been the target of electronic surveillance. Finally, Smith said that as a newsman in a hostile nation he was reluctant to "pursue an open legal confrontation with my own government on a matter which was very unclear." JA 24a-27a.

[11] JA 74a-87a.

Rule 56.[12] This course, appellees continue, is dictated by appellants' submission of affidavits in support of their case and by reference to extra-record evidence in appellants' memoranda to the District Court.[13] Thus appellees urge that the District Court properly applied the standards for summary judgment under Rule 56, regardless of the court's statement that it was granting motions to dismiss.[14]

We agree with appellees' characterization of the District Court's actions, but do not think it substantially alters the issue before that court or this one: Whether, granting all favorable inferences to the party opposing the motion, there exists any genuine issue of material fact between the parties.[15] If there is such an issue, the court may neither dis-

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[12] Appellee Nixon moved to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), JA 88a, while all appellees, including Nixon, asked for dismissal under Rule 12(b)(6) for failure to comply with the statute of limitations. JA 89a-90a.

[13] The extra-record evidence included congressional documents issued following investigation of national security surveillances and depositions taken in connection with *Halperin* v. *Kissinger, supra* note 3.

[14] Rule 56 provides for summary judgment when the papers filed with the court "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

[15] In *Mazaleski* v. *Treusdell,* 562 F.2d 701 (D.C. Cir. 1977), the District Court had granted defendant's motion to dismiss even though both parties had submitted extra-record evidence. This court treated the ruling as an award of summary judgment and applied the standards of Rule 56. *Id.* at 708.

miss the suit under Rule 12[16] nor grant summary judgment.[17] As the moving party, appellees (defendants below) bear the burden of showing that there are no genuine issues of material fact.[18]

III

Our disposition of the substantive claims presented by the Smiths is controlled by our decision today in *Halperin* v. *Kissinger*. We deal first with the statutory issue, then the constitutional questions.

A

The District Court in this case, as in *Halperin*, ruled that ambiguity in 1969 surrounding the meaning of the national security clause of Title III, 18 U.S.C. § 2511(3) (1976), foreclosed application of that statute to this wiretap program.[19] This was error. If the Smiths can demonstrate that there was no reasonable national security rationale supporting the wiretapping, Title III outlaws the surveillance that took place and provides for $100 in damages for each day of the wiretap plus punitive damages and

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[16] *See Jenkins* v. *McKeithen*, 395 U.S. 411, 421-422 (1969).

[17] *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 153, 157 (1970); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962).

[18] *Adickes* v. *S. H. Kress & Co.*, *supra* note 17, 398 U.S. at 159 ("burden of the moving party under Rule 56(c) to show initially the absence of a genuine issue concerning any material fact").

[19] *Smith* v. *Nixon*, 449 F.Supp. 324, 326 (D. D.C. 1978).

attorney's fees.[20] Since there is nothing in the record before us that contradicts appellants' allegation that the wiretap was initiated to discover the sources for stories by Smith that were "personally embarrassing" to appellees but involved no danger to national security,[21] there is no basis for summary judgment for the defendants.[22]

In its examination of the national security rationale for this surveillance, the District Court on remand should note that Smith did not satisfy the three criteria established by the Nixon Administration for identifying surveillance subjects. He had no personal access to confidential information that might be disclosed in the future, and, according to the memorandum to the Attorney General apparently requesting the wiretap, the Government had no information on him "of an internal security nature." [23] Consequently, there seems to have been little reason to believe, under the Government's own guidelines, that Smith posed a continuing security risk. Of course, the out-

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[20] *See Halperin* v. *Kissinger, supra* note 3, —— F.2d at ——, slip op. at 23-24. The private damage provision of Title III appears at 28 U.S.C. § 2520 (1976).

[21] JA 83a (Amended Complaint).

[22] As we noted in *Halperin*, even if defendants cannot show a sufficient national security rationale for the surveillance to prevent application of Title III, their understanding of the statute at the time of the wiretap would be relevant to establishing a qualified immunity defense. *Halperin* v. *Kissinger, supra* note 3, —— F.2d at ——, ——, slip op. at 33, 36-37.

[23] *See* text at note 7 *supra*.

come of this inquiry will hinge on facts adduced in the trial court, but we wish to emphasize that courts may not simply accept bland assurances by the Eexcutive that a situation did, in fact, represent a national security problem requiring electronic surveillance.

B

We also conclude that there was no basis for summary judgment on appellants' constitutional claims. The wiretap in this case appears to have violated the Fourth Amendment's warrant requirement.[24] Appellees would be entitled to immunity from an action for warrantless wiretapping if they can establish (1) that they had reasonable grounds to believe their actions were legal, and (2) that they did not act with malice or bad faith.[25] Appellants' allegation of bad faith,[26] however, has not been contravened in this record.

Equally, the District Court erred in holding that the Smith surveillance satisfied the "reasonableness" requirement of the Fourth Amendment because it

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[24] On the question of retroactive application of the Fourth Amendment's warrant requirement to national security surveillances following *United States* v. *United States District Court* (*Keith*), 407 U.S. 297 (1972), and *Zweibon* v. *Mitchell* (*Zweibon I*), 516 F.2d 594 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976), *see* our ruling today in *Zweibon* v. *Mitchell* (*Zweibon III*), —— F.2d —, — (D.C. Cir. No. 78-1348, decided July 12, 1979).

[25] *See Halperin* v. *Kissinger*, *supra* note 3, —— F.2d at ——, slip op. at 32-37.

[26] JA 83a (Amended Complaint).

only lasted for 89 days.[27] Such a determination depends on careful review of all of the circumstances. Certainly, the memorandum apparently requesting authorization for the Smith wiretap established no reasonable grounds for surveillance.[28] The District Court properly distinguished the 89-day Smith wiretap from that in *Halperin*, which extended for 21 months, but the reasonableness of a surveillance depends on its length in the context of what is sought and what is discovered. A surveillance may be entirely unreasonable even though it lasts for only 30 days, or ten days.[29] In addition, factors other than length of wiretapping—such as the justification for undertaking the surveillance and the manner of its conduct—should be considered. Obviously, the choice of the target for surveillance must be defensible and cannot be based on the sort of "political" reasons that Smith claims led to the surveillance of his family.[30] In support of this contention he points to the distribution within the Government of summaries of the overheard conversations in June 1970, ten months

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[27] *Smith* v. *Nixon, supra* note 19, 449 F.Supp. at 326.

[28] *See* text at note 7 *supra.*

[29] *Cf. Berger* v. *New York,* 388 U.S. 41 (1967) (striking down state law authorizing 60-day wiretap without a warrant).

[30] The House Judiciary Committee described the wiretap program involved here as conducted for "political purposes." H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 35 (1974); *see Halperin* v. *Kissinger, supra* note 3, —— F.2d at —— n.82, slip op. at 25 n.82.

after Smith left Washington for an academic fellowship in Massachusetts.[31] The national security need for such distribution is not immediately obvious. Thus, granting appellants all reasonable inferences from their complaint, we cannot say there are no genuine issues of material fact on the reasonableness claim.

Finally, it is relevant to the reasonableness determination that Smith was a working journalist. Wiretapping infringes the First Amendment rights of any target individual, as the courts have warned.[32] Although newsmen do not enjoy special legal privileges by dint of their employment,[33] "news gathering is not without its First Amendment protections * * *."[34] Smith's allegation that the surveillance was undertaken to "monitor" the sources of his stories closely tracks a warning from the Supreme Court:

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[31] JA 81a (Amended Complaint). Appellants also argue that the Government failed to minimize the intrusiveness of the wiretapping. *Id.*

[32] *E.g., Keith, supra* note 24, 407 U.S. at 313-314.

[33] *See Branzburg* v. *Hayes*, 408 U.S. 665, 684-686 (1972).

[34] *Id.* at 707. This court's holding in *Reporters Committee for Freedom of the Press* v. *AT&T*, 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, —— U.S. ——, 47 U.S. L. WEEK 3584 (March 5, 1979), which approved acquisition of journalists' long-distance telephone billing records by law enforcement agencies without notice to the journalists, is not controlling here. Compared to a review of billing records, the wiretapping program in this case is a much more intrusive invasion of any citizen's rights and a greater restriction on a journalist's professional freedom. Moreover, the alleged political motive behind the surveillance of the Smiths further calls into question the actions of appellees.

> Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. * * *[35]

Thus the District Court must consider Smith's profession as part of its finding on reasonableness, as outlined for the warrant-issuing process by Justice Powell in *Zurcher* v. *Stanford Daily*:

> [A] magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment * * * when he weighs such factors. * * *[36]

Our attention to the particular First Amendment issues raised by Smith's profession does not suggest any lesser value for the First Amendment interests of all of the appellants in not having their private conversations overheard by the Government, but simply highlights one feature of this case.

IV

The District Court also ruled that since the Smith surveillance took place in 1969, but this suit was not filed until 1976, the action was barred by the statute of limitations.[37] We believe that both the statutory

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[35] *Branzburg* v. *Hayes, supra* note 33, 408 U.S. at 707-708.

[36] 436 U.S. 547, 570 (1978) (Powell, J., concurring); *see Carey* v. *Hume*, 492 F.2d 631, 636 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974).

[37] *Smith* v. *Nixon, supra* note 19, 449 F.Supp. at 327. The applicable statutory provision is 12 D.C. Code § 301(8) (1973).

and constitutional causes of action survive because the secrecy surrounding the wiretap program prevented public disclosure of it until 1973, and because before that time appellants could not through the exercise of due diligence have discovered the existence of the wiretap.

The Title III claims pose no statute of limitations problem because the Act itself imposes on the Government a duty to notify those persons whose conversations are overheard.[38] The Government's failure to meet this requirement would toll the statute of limitations. Some exceptions to this requirement have been recognized to protect individual privacy,[39] but that consideration could not apply to the Smiths, the targets of surveillance.

On the constitutional claims, we follow this court's ruling of *Fitzgerald* v. *Seamans*:[40]

> Read into every federal statute of limitations, including the adoption of an analogous local statute of limitations, is the equitable doctrine that in case of defendant's fraud or deliberate concealment of material facts relating to his wrongdoing, time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit.
> * * *

---

[38] 18 U.S.C. § 2518(8)(d) (1976).

[39] *See United States* v. *Donovan*, 429 U.S. 413, 430 (1977).

[40] 553 F.2d 220, 228 (D.C. Cir. 1977).

Although appellees insist that this holding only applies to cases involving fiduciary relationships, that interpretation ignores the facts of *Fitzgerald*. The plaintiff in that case, a Government employee, charged that several federal officials had discharged him in retribution for testimony he gave before Congress. Information about the involvement of a White House official in Fitzgerald's dismissal was kept secret until after the statute of limitations had run. This court permitted Fitzgerald to sue the White House official anyway, because in the face of an "invocation of governmental secrecy" the plaintiff could not have learned through the exercise of due diligence of the wrong that had been done to him behind the scenes.[41] There was clearly no fiduciary relationship, in the formal sense of that term, between the White House official and Fitzgerald, a middle-level employee in the Department of Defense. Accordingly, we conclude that this exception to the statute of limitations does not rely on the existence of a fiduciary relationship.[42]

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[41] *Id.* at 228-229.

[42] *See Japanese War Notes Claimants Ass'n* v. *United States*, 373 F.2d 356 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967).

In *Lee* v. *Kelley*, D. D.C. Civil Action No. 76-1185, January 31, 1977, the District Court refused to toll the statute of limitations for damage claims for Government surveillance of the civil rights movement in the 1960s. The court ruled that the plaintiffs there were on notice as to the wiretapping because by 1968 and 1969, "the nation's leading newspapers were rife and accounts of [these] buggings * * *." Slip op. at 3. Using the same approach in this case, we cannot conclude on this record that appellants were on notice as to the existence of this wiretap before May 1973.

Applying the "due diligence" standard to this case, we find no basis for summary judgment in favor of appellees on statute of limitations grounds. A wiretap is by nature secret, and extraordinary efforts were undertaken to conceal the surveillance program involved here.[43] Indeed, the amended complaint in this case alleges that appellees engaged in affirmative acts of concealment that prevented the Smiths from discovering the surveillance.[44] At this stage of the litigation we cannot say that there is no genuine issue of material fact as to whether Government secrecy foreclosed the Smiths from learning of the wiretap before it became public knowledge. We cannot impose an obligation on all citizens to initiate a triennial request of the Government as to whether they are under official surveillance. Possibly appellees can offer evidence that the Smiths could have acquired information about the wiretap but simply

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[43] *See Halperin* v. *Kissinger, supra* note 3, —— F.2d at ——, ——, slip op. at 7, 11.

[44] JA 82a-83a. Appellants charge fraudulent concealment in appellees' failure to inform Justice Department officials of the existence of the wiretap records, which were relevant to the criminal prosecution in *United States* v. *Ellsberg and Russo*, No. 9373 (C.D. Cal. 1971), and in the incorrect denial of 1973 press reports of the wiretapping program. Such affirmative acts, according to *Fitzgerald* v. *Seamans, supra* note 40, 443 F.2d at 228, would provide the "aggravation" needed to bring this case within the traditional view that the statute of limitations is tolled when there has been fraudulent concealment of the injury that would serve as the basis for legal action. *See Holmberg* v. *Armbrecht*, 327 U.S. 392, 396-397 (1946).

failed to take the needed steps. We must, however, reverse the summary judgment.

V

Appellee Nixon moved to dismiss the Smith complaint on the ground that he was absolutely immune from civil suit as a former President. He now argues that the District Court's ruling should be interpreted as an acceptance of that claim, even though the court did not say so and, in fact, found Nixon liable in *Halperin*, the parallel civil damage action. This question, like the immunity for the other federal officials sued by the Smiths, is controlled by our *Halperin* opinion, which outlines the qualified immunity that applies to Executive acts taken in the course of duty.[45]

The District Court dismissed the action against C&P, which installed the wiretap, on the ground cited in the District Court's opinion in *Halperin*:

> C&P's limited technical role in the surveillance as well as its reasonable expectation of legality cannot give rise to liability for any statutory or constitutional violation. * * *[46]

We think this was the proper disposition. The telephone company did not initiate the surveillance, and it was assured by the highest Executive officials in this nation that the action was legal.[47]

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[45] *Halperin* v. *Kissinger, supra* note 3, —— F.2d at ——-——, slip op. at 32-44.

[46] *Smith* v. *Nixon, supra* note 19, 449 F.Supp. at 326.

[47] It is instructive that this holding, which recognizes an exception to the rule that a mistake of law is no defense to

Consequently, the judgment of the District Court is reversed and this case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

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liability, would apply in this case even if criminal liability were at issue. The Model Penal Code provides:

> A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:
>
> * * * * *
>
> (b) he acts in reasonable reliance upon an official statement of the law * * * contained in * * * (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

Model Penal Code § 2.04(3)(b) (Tent. Draft No. 11 1960). *See United States* v. *Barker*, 546 F.2d 940, 955-957 (D.C. Cir. 1976) (Merhige, J., concurring).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 76-798

HEDRICK SMITH ET AL., PLAINTIFFS

v.

RICHARD M. NIXON ET AL., DEFENDANTS

April 6, 1978

OPINION

JOHN LEWIS SMITH, Jr., District Judge.

This action under the First, Fourth and Ninth Amendments to the Constitution and Title 18, U.S.C. §§ 2511 and 2520 seeks declaratory and injunctive relief and money damages for defendants' allegedly illegal wiretapping of plaintiffs' home telephone. Plaintiffs are Hedrick Smith, a former diplomatic correspondent for the New York Times, his wife, Ann B. Smith, and their three minor children, Laurel Ann Smith, Jennifer Laurence Smith and Sterling Scott Smith. Defendants are Richard M. Nixon, Henry A. Kissinger, John N. Mitchell, H. R. Haldeman, John Erlichman, William C. Sullivan, Cartha DeLoach, Clarence Kelley, Griffin Bell (hereinafter cited as federal defendants) and the Chesapeake and Potomac Telephone Company (C&P). The matter is

before the Court on defendant Nixon's Motion to Dismiss, defendant C&P's Motion to Dismiss and federal defendants' Motion to Dismiss.

The electronic surveillance which prompted this suit was one of several such actions occurring in the same approximate time period. In early 1969 officials of the Nixon Administration were concerned about the leaking of confidential foreign policy information which appeared to be detrimentally affecting progress towards reaching solutions to several ongoing world problems, including the Vietnam war, the SALT talks, and Sino-American relations.

Between February and April of 1969 these officials were particularly worried about references to classified information and certain foreign policy documents appearing in the press. The leaks related to United States policies in Vietnam, China, the Soviet Union, Europe and the Mideast. After consulting with Attorney General Mitchell, National Security Affairs Advisor Kissinger, and FBI Director Hoover, President Nixon authorized a program of electronic surveillance of individuals suspected of leaking information injurious to the national defense and foreign policy of the United States. Those to be wiretapped would be selected on the basis of access to information, material in security files, and evidence developed as the surveillance proceeded.

On June 4, 1969 such electronic surveillance was instituted on the residence telephone of Hedrick Smith at 3409 Patterson Street, N.W., Washington, D.C. The surveillance lasted for eighty-nine (89)

days, until August 31, 1969. Plaintiffs also allege that "disclosures" of information obtained thereby were made within the executive branch during the period of alleged surveillance as well as in June 1970 and in 1971.

Plaintiffs in this case contend that the surveillance violated Title 18 U.S.C. §§ 2511 and 2520, statutory provisions legislatively contained in the Omnibus Crime Control and Safe Streets Act of 1968, their "right to privacy and security against unreasonable searches and seizures guaranteed by the First, Fourth and Ninth Amendments," and that it was "unreasonable and illegal."

In a similar case recently decided in this jurisdiction, this Court held that the plaintiffs had no cause of action under the Omnibus Crime Control and Safe Streets Act of 1968. *Halperin* v. *Kissinger*, 424 F. Supp. 838 (D.C. 1976). Although this statute was in effect when the wiretapping actions in both cases occurred, the legality of warrantless national security wiretaps had been considered only in subsequent judicial decisions. *United States* v. *United States District Court (Keith)*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed. 2d 752 (June 19, 1972); *Zweibon* v. *Mitchell*, 170 U.S. App. D.C. 1, 516 F.2d 594 (June 23, 1975); *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976). These decisions clarified the ambiguity surrounding national security wiretaps.

The confusion centered around the interpretation of 18 U.S.C. § 2511(3) which reads in part:

> Nothing contained in this chapter or in section 605 of the Communications Act of 1934 . . . shall limit the constitutional power of the President to take such measures as he deems necessary . . . to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.

Until the *Keith* and *Zweibon* decisions, in 1972 and 1975 respectively, it was evident that the meaning and limits of § 2511(3) were open issues. In *Halperin*, this Court ruled that given the confused state of the law and the 30-year history of similar Executive actions the defendants "should not be held to have acted at their peril in [that] vacuum" and denied retroactive application of *Keith* and *Zweibon*. The same reasoning applies to deny retroactive application of *Keith* and *Zweibon* in this case.

Considering plaintiffs' Fourth Amendment unreasonable search and seizure allegations, there is no doubt that even if § 2511(3) and prior presidential practice could be invoked to authorize warrantless wiretaps, national security surveillance still must be "exercised in a manner compatible with the Fourth Amendment." *Keith, supra*, 407 U.S. at 320, 92 S.Ct. at 2138. In determining the reasonableness of the wiretap, the Court must balance the duty of the government to protect security with the violation of plaintiffs' privacy and free expression. *Keith, supra*, 407 U.S. at 314-5, 92 S.Ct. 2125.

In this case, the surveillance continued for a period of eighty-nine (89) days. The Supreme Court has required "particular, precise, and discriminate" procedures in many Fourth Amendment cases. *See e.g.*, *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Berger* v. *New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967); *Osborn* v. *United States*, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed. 2d 394 (1966). The Justice Department complied with this by requiring renewal and review of national security electronic interceptions every ninety (90) days. The surveillance in this case was carried out within the "particular, precise and discriminate" limits set by the Justice Department. Under the then existing guidelines former Attorney General Mitchell would not have been required to review the surveillance until one day after it was removed from the Smith telephone. This eighty-nine day wiretap, conducted with stated limits and then discontinued, is far different from the wiretap in *Halperin*, which continued for twenty one months without any review, evaluation or attempt to minimize the interceptions.

18 U.S.C. 2511(3) and prior presidential practice set forth a good faith basis for initiating the wiretap, and it was reasonably conducted within Department of Justice regulations specifically concerning national security. This surveillance, therefore, was not unreasonable and did not violate the plaintiffs' constitutional rights.

The Court's reasoning in *Halperin* relative to C&P applies equally to the instant situation. There the Court stated "C&P's limited technical role in the surveillance as well as its reasonable expectation of legality cannot give rise to liability for any statutory or constitutional violation." There was no wrongdoing in this case by C&P. It acted in reliance upon a request from the highest Executive officials and with assurance that national security matters were involved.

The action complained of occurred in 1969 and suit was not instituted until 1976. Plaintiffs, realizing that their claims would be barred by the applicable three year statute of limitations, rely on *Cole* v. *Kelley*, 438 F.Supp. 129 (C.D. Calif. 1977). They assert that the doctrine of fraudulent concealment applies to wiretapping cases to toll the statute of limitations. The difference between *Kelley* and the present case goes to the very heart of the fraudulent concealment doctrine. In *Kelley* the government admitted that the use of a bug in that case was illegal and evidence obtained therefrom tainted. *Cole* v. *Kelley*, 438 F.Supp. at 136. Here, the surveillance was initiated in good faith and within guidelines specifically relating to national security matters.

In *Fitzgerald* v. *Seamans*, 180 U.S. App. D.C. 75, 553 F.2d 220 (1977), cited by plaintiffs, the Court in discussing fraudulent concealment states that it

> has been applied, for example, in securities cases dealing with fraudulent or deceptive practices,

> and in medical malpractice cases, where the "concealment" element is particularly supported by the combination of fiduciary relation and layman's reliance on experts. (citations omitted)

There is no relationship between the parties necessitating disclosure of the activities and no legal basis supporting plaintiffs' claim of fraudulent concealment.

Accordingly, the Motions to Dismiss filed by defendant Nixon, defendant C&P, and federal defendants are granted.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

Civil No. 78-1526

No. 78-1526

[Filed Jul. 12, 1979]

HEDRICK SMITH and ANN B. SMITH, suing individually and on behalf of their minor children, LAUREL ANN SMITH, JENNIFER LAURENCE SMITH, and STERLING SCOTT SMITH, APPELLANTS

v.

RICHARD M. NIXON, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: WRIGHT, Chief Judge, ROBINSON, Circuit Judge, and GESELL,* District Judge

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed as to appellee C & P Telephone Company, and reversed as to all other appellees, and the case is remanded for further proceedings, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court:

/s/ George A. Fisher
Clerk
GEORGE A. FISHER

Date: July 12, 1979

Opinion for the Court filed by Chief Judge WRIGHT.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 305571 136

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-882

RICHARD M. NIXON, et al.,

Petitioners,

v.

HEDRICK SMITH, et al.,

Respondents.

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LEON FRIEDMAN
Hofstra University
School of Law
Hempstead, N. Y. 11550

FLOYD ABRAMS
GERALD J. BROWN
CAHILL GORDON & REINDEL
80 Pine Street
New York, N. Y. 10005

JAMES C. GOODALE
BRENDA BAKER
THE NEW YORK TIMES
229 West 43rd Street
New York, N.Y. 10036

Attorneys for Respondents

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In the

Supreme Court of the United States

October Term, 1979

No. 79-882

Richard M. Nixon, et al.,

Petitioners,

v.

Hedrick Smith, et al.,

Respondents.

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Preliminary Statement

This is one of four petitions involving three separate cases now before this Court (*Halperin* v. *Kissinger*, 606 F.2d 1192 (D.C. Cir.), *petition for cert. filed*, 48 U.S.L.W. 3404 (U.S. Dec. 7, 1979) (No. 79-880); *Zweibon* v. *Mitchell*, 606 F.2d 1172 (D.C. Cir.), *petition for cert. filed*, 48 U.S. L.W. 3404 (U.S. Dec. 7, 1979) (No. 79-881); *Smith* v. *Nixon*, 606 F.2d 1183 (D.C. Cir.), *petition for cert. filed*, 48 U.S.L.W. 3404 (U.S. Dec. 7, 1979) (No. 79-882)) involving substantially related issues of warrantless wiretaps and national security, the invasion of First Amendment rights, immunity for constitutional torts and the application of the good faith defense. Despite the government's assertions, all the cases are not properly ripe for review by this Court at this time.

For the reasons stated below, respondents believe that the first question presented by the government—on absolute Presidential immunity—was in large part settled by this Court less than two years ago in *Butz* v. *Economou*, 438 U.S. 478 (1978). Furthermore, the case presents a most extreme factual and legal issue—the acts of Mr. Nixon in question here formed the basis of Article II, paragraph 2 of the articles of impeachment recommended by the House Judiciary Committee. *See* H.R. Rep. No. 93-1305, 93d Cong. 2d Sess. 146-50 (1974). Thus the issue of absolute Presidential immunity presents itself in this case in such an unusual posture that it is extremely unlikely to repeat itself.

The second and third questions presented by the government are completely dependent on facts which were developed to some degree in one of the three cases now before this Court (*Halperin* v. *Kissinger, supra*) but which were never made part of the record in this case. Thus a remand for further proceedings is essential in this case before questions 2 and 3 can be properly addressed. For these related reasons, as explained below, certiorari should be denied.

A. *Presidential Immunity*

The only one of the three questions in the government's petitions that might present a "pure" question of law is the first, dealing with Presidential immunity.[1] As noted later in this memorandum, considerations of Presidential immunity might well be different when a sitting President is sued for a common law tort than when an ex-President

[1] The issue of the immunity of the President's "closest advisors, including the Attorney General"—as distinguished from the President himself—was already settled by this Court in *Butz* v. *Economou*, 438 U.S. 478 (1978).

is sued for constitutional torts which formed the basis of imminent impeachment proceedings against him. Since the Constitution allows impeached Presidents to be tried criminally for actions that led to impeachment,[2] a civil suit for damages should also be allowed for those same acts. And the rule should be the same for a President who was forced to resign because of imminent impeachment proceedings against him.

Once the issue is properly framed, the government's first question (insofar as it was not already settled by *Butz* v. *Economou*, 438 U.S. 478 (1978)) is properly viewed as a unique one in our constitutional history. Mr. Nixon is a "class of one," *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 472 (1977), the only President forced to resign because of the threat of impeachment proceedings, the only President named as an unindicted co-conspirator by a federal grand jury (*see United States* v. *Nixon*, 418 U.S. 683, 687n.2 (1974)), the only ex-President explicitly granted a Presidential pardon for possible criminal acts taken while President of the United States. *See* 10 *Weekly Compilation of Presidential Documents* 1103 (1974).

Civil liability against an ex-President for engaging in the acts in question here is not likely to be a recurring problem. It would surely have to be a "rare" event, as the court noted below in the *Kissinger* case (Kissinger Petition at 45a). This Court has already examined the special legal problems of the Nixon presidency in three cases, *United States* v. *Nixon, supra, Nixon* v. *Administrator, supra*, and

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[2] Art. 1, Sec. 3, cl. 7: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or profit under the United States . . . *but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.*" (emphasis added).

Nixon v. *Warner Communications, Inc.*, 435 U.S. 589 (1978). A fourth Nixon case is not necessary now.

B. *Lack of Factual Development*

The Court of Appeals below remanded all three cases for trial or further proceedings. In this action there has been no discovery whatsoever—indeed the defendants have not even submitted an answer.[3] In *Zweibon* v. *Mitchell, supra,* there had been some limited discovery but no trial. In *Halperin* v. *Kissinger, supra,* the district court had granted summary judgment for and against certain defendants but the Court of Appeals ordered a remand for hearings on a variety of issues: (1) whether the wiretap in question (part of the same program involved in this case) "was a valid national security action" (Kissinger Petition at 26a); (2) whether "the surveillance was initiated for political reasons" (*id.* at 27a) and thus was not within the scope of 18 U.S.C. §2511(3) (repealed 1978) dealing with presidential surveillance powers; (3) whether "Fourth Amendment reasonableness standards" were met in installing and maintaining the wiretaps (*id.* at 32a); (4) in addition, an appropriate hearing on damages would be necessary at which the plaintiffs could present evidence on "emotional distress and mental anguish" (*id.* at 34a); (5) the immunity of individual defendants would also have to be examined in further proceedings (*id.* at 44a); (6) there were also "genuine issues of material fact as to Kis-

[3] Rather than submit an answer the defendants moved to dismiss the complaint on statute of limitations grounds. The trial court did dismiss the action on three separate grounds: (1) the statute of limitations had run; (2) the action was barred as a matter of law because the defendants had a good faith defense, and (3) ex-President Nixon was absolutely immune. The Court of Appeals reversed the district court on all three issues (except as to the telephone company defendant) and ordered the case to proceed to trial.

singer's role in the installation and maintenance of the wiretap" which precluded the grant of summary judgment and required further hearings in the district court (*id.* at 49a-50a).

In short, even in the *Kissinger* case, the most fully developed of the three related actions, further evidentiary hearings were required by the Court of Appeals. These hearings might obviate or eliminate the factual basis of the questions presented in the related petitions for certiorari. At the very least they will allow the issues to be presented in a more fully developed form. *A fortiori,* these considerations apply to this case where there was no discovery and to the *Mitchell* case where discovery was limited.

Counter Statement of the Case

The government's petition misstates the background for the wiretap in question here and omits significant facts concerning the Smith wiretap.

First and foremost, respondent Hedrick Smith is a working journalist whose home telephone was wiretapped day and night for 89 days with the consequence that the government overheard every conversation he had on that phone with his sources, his colleagues and his editors—as well as his personal family conversations. It would be difficult to imagine a more sweeping or gross invasion of the First Amendment interests of the working press. As this Court said in *Branzburg* v. *Hayes,* 408 U.S. 665, 707-708 (1972), "[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." *See also Zurcher* v. *Stanford Daily,* 436

U.S. 547, 570 (1978) (Powell, J., concurring). Whatever the background or history of the thirty years of national security wiretaps before 1969 they had not been used to any degree for the purpose of wholesale and sweeping wiretapping of journalists.[4]

The government's petition recites that "between February and April, 1969" various leaks to the press occurred involving certain foreign policy documents and classified information. (Government's Petition at 4) These leaks allegedly revealed our foreign policy position on "several important and sensitive issues," including SALT, peace proposals in the Middle East, terminating our involvement in Viet Nam "and the return of the island of Okinawa to Japanese control." (*Id.* at 4-5) As a result of these leaks, high government officials claim to have concluded that foreign policy initiatives were being jeopardized and that the government had to take action to locate the sources and stop the flow of secrets to the press.

The court below held that the government's legal argument in justification of the wiretaps should be rejected out of hand—namely that the President has the "inherent power" to wiretap journalists without a warrant because of a suspicion that information—classified or otherwise—was leaked to the press and published to the world.[5] If a

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[4] The Church Committee (Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities) reported two prior cases of working journalists being wiretapped for publishing classified information. One journalist was wiretapped for seven days in 1961 and another for 33 days in 1962. *See* Senate Select Comm. to Study Governmental Operations, *Supplementary Detailed Staff Reports of Intelligence Activities and the Rights of Americans—Final Report, Book III,* S. Rep. No. 94-755, 94th Cong., 2d Sess. at 323 ("Warrantless FBI Electronic Surveillance") (1976).

[5] The Church Committee Final Report also condemned the type of wiretap program at issue here. It noted: "This wiretapping program did not reveal the source of any leaks of classified data,

violation of the espionage laws occurs, Title III gives the government ample authority to investigate the crime, in conformity with the requirements of the Fourth Amendment. *See United States* v. *United States District Court*, 407 U.S. 297 (1972).

More important, the facts revealed in the *Kissinger* case and the public record show that the asserted justification simply did not exist as far as the respondents were concerned. Put another way, the events that supposedly triggered the wiretap program had nothing to do with the actions of Hedrick Smith.

The Okinawa story (the only alleged "leak" involving respondents herein) occurred in June, 1969—not between February and April, 1969—and thus took place after the crucial meetings in April and May, 1969 when the key decisions were made to embark on the program (*see* Kissinger Petition at 5, 4a-6a). Thus Hedrick Smith was not involved in any of the leaks that gave rise to the program, contrary to the implication of the government's petition.[6]

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which was its ostensible purpose, but it did generate a wealth of information about the personal lives of the targets . . . . Vast amounts of political information were also obtained from these wiretaps." Senate Select Comm. to Study Governmental Operations, *Intelligence Activities and the Rights of Americans—Final Report, Book II*, 94th Cong., 2d Sess. 200 (1976) (footnote omitted).

[6] We also question the extent to which the government is applying the national security concept. If a story about our negotiations with our Japanese ally over return of an island about which many Americans had a great interest justifies a three month wiretap on a working journalist on national security grounds, then that term has lost its meaning. *See United States* v. *Ehrlichman*, 376 F. Supp. 29 (D.D.C. 1974), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977). The range of reporting to which the government tries to apply its theory would make scores of journalists writing on foreign or diplomatic affairs proper targets if they reported anything more than official government handouts. That is not what the First Amendment means. *See Houchins* v. *KQED, Inc.*, 438 U.S. 1, 13-14 (1978) (Burger, C.J.).

Furthermore, he did not meet any of the criteria established by the principals—Nixon, Hoover, Mitchell, Kissinger—for determining who should be targeted for the wiretaps. The criteria were: (1) access to the leaked information; (2) unfavorable information in the individual's security file; (3) FBI investigations that listed the individual as a potential source of leaked information. (Government's Petition at 5-6) As the court below noted, "Smith did not satisfy the three criteria established by the Nixon administration for identifying surveillance subjects." He had no access to classified information and there was no internal security information on him. Nor did the wiretap itself reveal any classified material. Thus, as the court said below, "there seems to have been little reason to believe, under the Government's own guidelines, that Smith posed a continuing security risk." (Government's Petition at 8a)

Thus the public record facts indicate the contrary of what the government asserts—the wiretap program against the respondents here was not a legitimate national security matter, but it was, as the respondents asserted in their complaint, "initiated . . . and used by defendants . . . in bad faith for the purpose and effect of monitoring the sources of plaintiff Hedrick Smith's news stories which were personally embarrassing to high government officials but which did not constitute violations of national security laws or regulations." (Amended Complaint par. 34; Smith Joint App. 83a)

In summary, the government's effort to justify the wiretap program as a whole is without substance or legal support. Nor does it answer the question of whether any particular target of the program was properly chosen. When the victim is a journalist who should never have been targeted under any circumstances, who was not involved in the allegedly serious leaks that gave rise to the program,

who did not meet the criteria for being selected and whose conversations—and the conversations of his entire family —were seized in a wholesale sweep for three months, there is no possibility of justifying his selection. Regardless of the need for a warrant, the Fourth Amendment's other requirements—probable cause, particular description of the things to be seized, minimization, time limitation and so on—were clearly violated.

Reasons for Denying the Writ

A. *Presidential Immunity*

The chief question which the government seeks to present to the Court is the issue of Presidential immunity from tort liability for acts he took as President. On reflection, it is obvious that the question may be presented in a variety of situations:

(1) Suits against a sitting President for common law torts committed while exercising Presidential authority;

(2) Suits against an ex-President for common law torts committed while exercising Presidential authority;

(3) Suits against a sitting President for constitutional torts committed while exercising Presidential authority;

(4) Suits against an ex-President for constitutional torts committed while exercising Presidential authority; and

(5) Suits against an ex-President for constitutional torts committed while exercising Presidential authority which torts were the basis of impeachment proceedings or led to forced resignation because of imminent impeachment proceedings.

The government's petition presents the question as if it involved suits in category one above. (*See* Kissinger

Petition at 17, n.16.) It may well be that a sitting President should not be sued for a libel or slander he uttered in a Presidential address. Certainly we do not want a President to be diverted from an international crisis by a deposition or trial subpoena. And *Barr* v. *Matteo,* 360 U.S. 564 (1959) may still have some vitality.

But *Butz* v. *Economou,* 438 U.S. 478 (1978) made a careful distinction between common law torts and actions of a federal official which "ignored an express statutory or constitutional limitation on his authority." *Id.* at 489. The Court noted that prior cases had established that "there could be no immunity defense," for an "unconstitutional act." *Id.* at 490-91. This Court wrote that "*Barr* did not purport to protect an official who has not only committed a wrong under local law, but also violated those fundamental principles of fairness embodied in the Constitution." *Id.* at 495 (footnote omitted).

Furthermore, this principle was applied to every federal official up to cabinet rank. This Court rejected the idea that while a federal officer who breaks into a citizen's home without legal authority is liable, "an official of higher rank who actually orders . . . a burglary is immune simply because of his greater authority." *Id.* at 506. This Court quoted from the famous lines of *United States* v. *Lee,* 106 U.S. 196, 220 (1882), " 'No man in this country is so high that he is above the law.' " *Id.* at 506.

It would simply be an absurdity to allow a federal agent who committed a burglary to be sued, to allow his superiors —up to cabinet level—to be sued if they ordered the burglary, but to prohibit a suit against the President who may have deliberately and consciously and maliciously ordered the operation. There is simply no justification in reason or law for the buck to proceed to the cabinet but to stop before

it reaches the President, particularly on the facts at issue in this case.

Butz would therefore determine the issue of whether a President may be sued for committing a constitutional tort (categories 3, 4 and 5 above). The problems of suing a sitting President might still give a court pause, but that issue is not present in this case. In fact, as noted above, we have the most extreme situation imaginable—a suit for a constitutional tort against an ex-President whose acts led to imminent impeachment proceedings and a forced resignation. Since the impeachable acts could later form the basis of criminal proceedings (Art. I, Sec. 3, Cl. 7, quoted in fn. 2 above), a civil suit for damages should also be allowed.

But in our entire political history it is only the events of the late 1960's which have even raised the question. Citizens simply do not sue ex-Presidents for acts they took while President. To examine the question of Presidential immunity in such an unusual and aberrational context is simply inappropriate.

The immunity of the "closest advisors" of the President "including the Attorney General" was necessarily settled in *Butz* v. *Economou, supra.* It is impossible to distinguish between the Secretary of Agriculture who was not granted absolute immunity in *Butz* and the Attorney General, held liable below. To the extent that a cabinet level officer of any kind is exercising judicial-type or prosecutorial functions (as distinguished from the investigative, non-prosecutorial actions involved in the instant case) he will be protected, as this Court noted in *Butz.* But the government is simply trying to reargue *Butz* in this petition by calling the Attorney General and the other defendants (who include FBI officials as well) the "closest advisors" of the President. Every

cabinet member is a "close advisor" of the President, as are most of the higher level positions of each executive department. There is nothing in the *Butz* case that would distinguish between executive department officials as far as immunity is concerned depending on their proximity to the President.

B. *Good Faith Immunity as a Matter of Law*

The second question presented by the petition is whether the defendants have proved their good faith as a matter of law since their actions occurred before the decision of this Court in *United States* v. *United States District Court,* 407 U.S. 297 (1972) *("Keith").* Whether that question is properly presented in the other cases—which we dispute below —it cannot be determined *in this case* at the present stage of the proceedings. The government by trying to group all three of the pending cases together has overlooked the different procedural stages of the actions and has presented a question which has no relevance for the *Smith* respondents.

The government's argument presented in the Kissinger petition accepts the fact that the good faith defense presents both an objective and a subjective component, as outlined in both *Butz* and *Procunier* v. *Navarette,* 434 U.S. 555 (1978). The government argues that in *Halperin* v. *Kissinger, supra,* there was no finding of malice or subjective bad faith since the trial judge did not find the basis for an award of punitive damages. However, the trial judge noted explicitly "As for any contention of subjective good faith, the undisputed record in this case controverts such a defense." (Kissinger Petition at 73a) The government seems to suggest that only the same kind of finding of malice that justifies an award of punitive damages can lead to a finding of subjective bad faith. That is simply not the law. A court

might well conclude that an official acted in bad faith (*i.e.*, in clear and conscious disregard of an established right) which justified a compensatory damage award but he did not act with such malice as to justify an award of punitive damages. *See Wood* v. *Strickland*, 420 U.S. 308, 322 (1975): "A *compensatory award* will be appropriate only if the school board member has acted with such an impermissible motivation . . . that his action cannot reasonably be characterized as being in good faith." (emphasis added). *See also Cruz* v. *Beto*, 603 F.2d 1178 (5th Cir. 1979); *Faraca* v. *Clements*, 506 F.2d 956 (5th Cir.), *cert. denied*, 422 U.S. 1006 (1975) (knowing but nonmalicious failure to obey the law can lead to award of compensatory damages: no punitive damages awarded).

If the government's contention is correct, the converse would have to be true as well: whenever there is a finding of subjective bad faith, then punitive damages must be awarded automatically. The case law does not support that proposition, and it is a position that the government would surely dispute in another context.

More important, as far as the Smith respondents are concerned, that argument has absolutely no meaning in their case. There was no finding of an absence of subjective bad faith or a lack of malice. There was no determination of these issues at all, unlike the *Kissinger* case. There was no discovery, no factual submissions on this point, not even an answer by the defendants. Even if this Court grants certiorari in *Kissinger* and adopts the government position on this point, it would not affect the Smith respondents. There might well be evidence of malice in the papers held by the government which respondents have not seen. At this stage of the *Smith* case, that issue cannot be determined against the respondents.

As for the objective good faith defense, the government cannot succeed on that issue either. Its entire argument

rests on the notion that until this Court decided the *Keith* case, there was no settled constitutional law on national security wiretaps. Thus the defendants should have a qualified immunity for their actions.

Once again, even if that issue were determined in favor of the government, that would not dispose of the *Smith* case. The defendants must satisfy both components of the good faith test—subjective and objective. Since they cannot succeed on the subjective good faith test because of the lack of any findings on that issue in this case and because no discovery of any kind has been allowed, success on the objective good faith issue will avail them nothing in this case. It must proceed further no matter what happens in the *Kissinger* case petition.

More important, the government ignores the findings of the Court below that *Keith* did not establish any new law on the subject. It did not overrule past decisions nor point in any new direction. This Court's decision in *Katz* v. *United States,* 389 U.S. 347 (1967), which predated all of the events in question, established that the Fourth Amendment covered more than property rights, it extended to incorporeal words as well as things, and specifically applied to the seizure of words through a wiretap. A warrant was therefore required for such seizures.

Most significantly, the *Keith* case only dealt with the need for a warrant. It did not change any of the preexisting law on other requirements of the Fourth Amendment, including the need for probable cause, the need for specific descriptions of the things to be seized, the need for minimization and time limitations. All the "reasonableness" requirements of the Fourth Amendment were always part of the law. It is the Smith respondents' claim that regardless of the warrant requirement, other violations of the

Fourth Amendment occurred in their case: there was no probable cause for selecting them as a target, an effort was made to infringe upon their First Amendment protected journalist activities, the wiretap was on too long, no minimization occurred, dissemination of the wiretap materials went to political operatives and so on. Once again, even if this Court decided that *Keith* did establish new law—a point which we dispute—a trial would still be necessary on all the other "reasonableness" requirements of the Fourth Amendment.

C. *Retroactivity*

The final question presented by the government deals with the question of the retroactivity of the *Keith* case and the application of the criteria of *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971). The simple answer to the government's claim is that the *Chevron Oil* criteria do not apply to a situation where the good faith defense *already* applies. The good faith defense takes into account the unfairness of applying new law to a government official who sincerely believed that his actions were legal at the time they occurred. The *Chevron Oil* criteria are not additional tests to be applied when the good faith factors—both subjective and objective—have already been invoked.

This Court has previously noted that different considerations apply in different types of cases when problems of retroactivity arise. For example, there are special rules applying to retroactive application of new rules of criminal procedure, *Linkletter* v. *Walker,* 381 U.S. 618 (1965). There are special rules dealing with the effect of new law on municipal or other governmental bonds, *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371 (1940). There are also special rules on statute of limitations problems where parties have relied upon established

rules in planning for the time to bring suit which was the precise problem involved in *Chevron Oil.*

But the ordinary rule in tort litigation is that new rules are retroactively applied, *see Cadillac Motor Car Co.* v. *Johnson,* 221 F. 801 (2d Cir. 1915) (retroactive application of new rule established in *MacPherson* v. *Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050 (1916); *see also Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U.S. 538 (1941) and discussion of the Court below in *Zweibon* v. *Mitchell, supra.*) (Mitchell Petition at 10a-17a)

In cases involving constitutional torts, the special rule on retroactive application of new law is the objective good faith defense: a government official will not be held liable if he acted sincerely without an intent to cause injury and if the right alleged to have been violated was not "clearly established." *Butz,* 438 U.S. at 498. There was no indication in *Butz, Procunier* v. *Navarette, supra* or *Wood* v. *Strickland, supra* that in addition to the test established in those cases on the objective good faith defense, ex post facto or retroactivity problems would have to be examined anew through a different and overlapping set of criteria established in *Chevron Oil.* Those criteria relate to a totally different problem where issues of subjective intent do not apply in the same way. Thus there is no need to discuss the *Chevron Oil* criteria in this situation.

If the criteria are applied, however, we believe that they require retroactive application of the *Keith* decision, just as the court below held in the *Mitchell* case.

Once again, the government seeks review of the decision below by citing legal rules and arguments which have no application to the current case before the Court.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

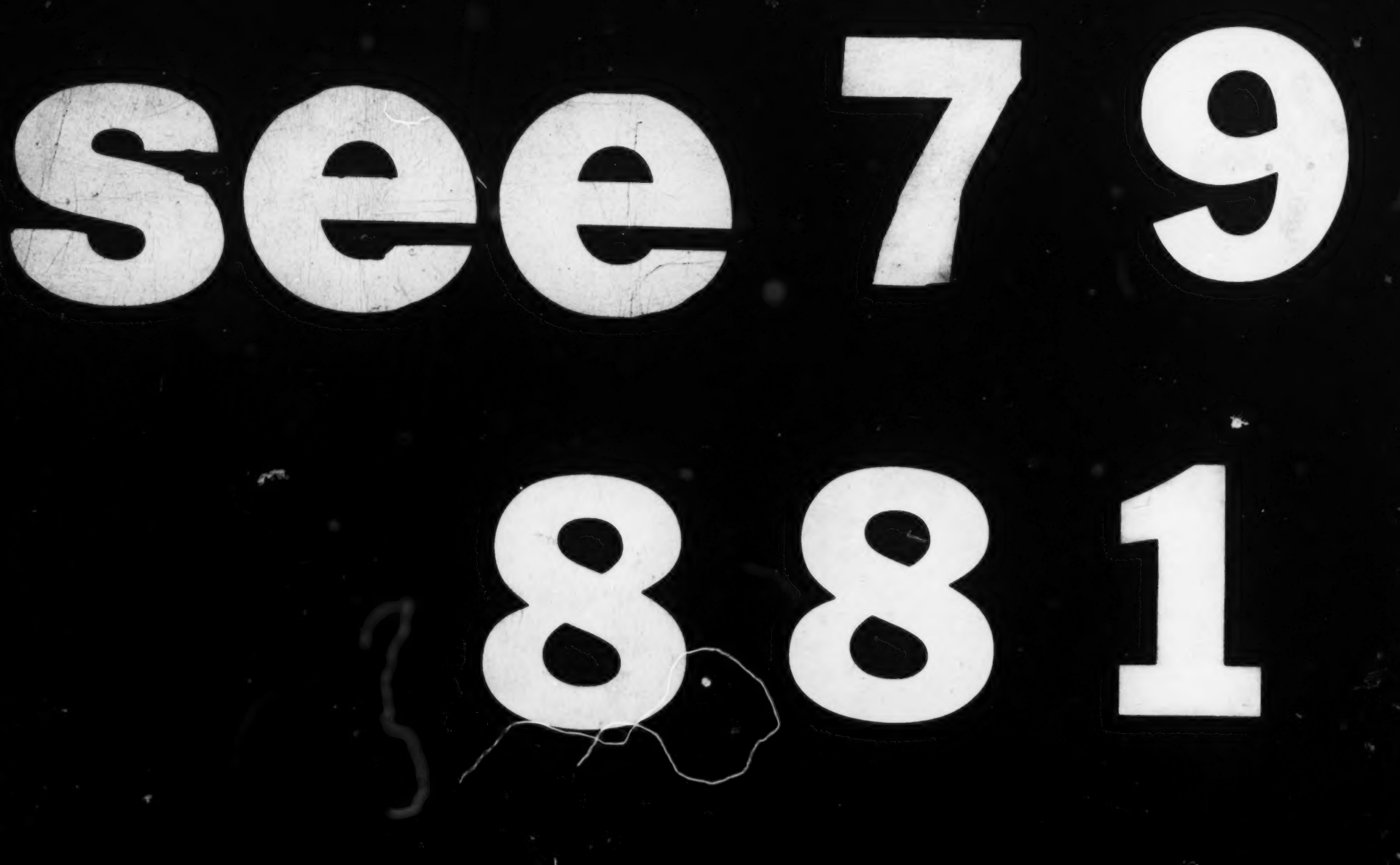
Respectfully submitted,

LEON FRIEDMAN
Hofstra University
School of Law
Hempstead, N. Y. 11550

FLOYD ABRAMS
GERALD J. BROWN
CAHILL GORDON & REINDEL
80 Pine Street
New York, N. Y. 10005

JAMES C. GOODALE
BRENDA BAKER
THE NEW YORK TIMES
229 West 43rd Street
New York, N.Y. 10036

Attorneys for Respondents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